No. 92-2003

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

TIMES PUBLISHING COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the First Amendment, portions of a federal public corruption prosecution may be closed to the press and public without notice and hearing simply because no member of the press or public is "actually present" when closure is requested?

RULE 29.1 STATEMENT

Petitioner Times Publishing Company, publisher of the *St. Petersburg Times*, is a subsidiary of Times Holding Company, Inc., which is itself a subsidiary of the Poynter Institute for Media Studies, Inc. Times Publishing Company's subsidiaries are Congressional Quarterly, Inc., Trend Magazines, Inc. and Modern Graphics, Inc.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Times Publishing Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case captioned *In re Times Publishing Co.*, 987 F.2d 708 (11th Cir. 1993).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 987 F.2d 708, and is

reprinted at 1a.[1] The opinion of the United States District Court for the Middle District of Florida is not reported, but is reprinted at 16a.

JURISDICTION

On March 17, 1993, a panel of the United States Court of Appeals for the Eleventh Circuit held that, consistent with the First Amendment to the United States Constitution, the public and the press may lawfully be excluded from portions of a federal criminal prosecution without notice or hearing where no member of the press or public is "actually present" to object at the time closure is sought. *In re Times Publishing Co.*, 987 F.2d at 713; 9a. That decision expressly and directly conflicts with recent decisions of the United States Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth and District of Columbia Circuits. This Petition is being docketed within 90 days from entry of the decision of the Eleventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[1] References to the Appendix are designated as "___a."

STATEMENT OF THE CASE

First Amendment freedoms are fragile, and can be eroded where sensitive procedures are not imposed to preserve them. This Petition, brought by Times Publishing Company, owner and publisher of the *St. Petersburg Times*, details the dangers inherent in an insensitive procedural rule, one that effectively undermines the substantive right it purports to protect.

A. Statement of Facts.

The criminal prosecution underlying this Petition began in January 1991, when Charles B. Corces ("Corces"), a criminal defense attorney from Tampa, Florida, was charged by the State of Florida with bribing Assistant State Attorney John Valenti ("Valenti") in order to gain favorable treatment or sentences for criminal defendants in pending state prosecutions. Valenti also was charged.

In January 1992, shortly before their state criminal trials were set to begin, Corces and Valenti were indicted by the United States Attorney for the Middle District of Florida on federal charges of conspiracy, extortion and bribery. R1.[2] The federal case was assigned to The Honorable William J. Castagna in the United States District Court for the Middle District of Florida, the state charges

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[2] References to the Appendix filed by Petitioner with the United States Court of Appeals for the Eleventh Circuit are designated as "R___" to distinguish them from references to the Appendix accompanying this Petition.

were dropped, and the federal trial of Corces, who had requested an early trial date, was set for March 1992.

Two weeks later, at a status conference, federal prosecutors requested and were given permission to engage in an *ex parte* conference with the Judge. Following this conference, Corces' trial date was postponed until May 1992. R2. No notice of this *ex parte* communication was given to the press or to the public, the conference was not publicly docketed, and a transcript of the conference, if it exists, never has been provided. The public docket shows only that the trial was continued. R2.

In April 1992, the government filed an *ex parte* motion under seal in which it requested a second continuance of the trial. *See* R3. Once again, neither notice of the motion, nor the motion itself, was made available to anyone other than federal prosecutors and the District Court. To date, even Corces has not seen it.

On May 4, 1992, without explanation, Judge Castagna recused himself, and the case was transferred to The Honorable Elizabeth Kovachevich, who reset Corces' trial for August 1992. R3. On June 19, 1992, having learned of the prosecutors' *ex parte* discussions with the court, Corces filed a Motion to Compel Disclosure of Past, Present and Future Ex Parte Communications and a Motion to Recuse. R4. These motions were denied. *Id.*

Four months later, during a status conference, a third *in camera* conference was conducted before the assigned magistrate judge. Like its predecessors, the conference was not preceded by any notice to the press or the public, and no mention of its *in camera* portion appeared on the public docket. *See* R5. No transcript of the proceedings

has been released. The following day, Corces' trial was postponed until October 1992.

This pattern of secrecy continued throughout the pre-trial stages of this federal corruption prosecution.

On October 19, 1992, just two weeks before jury selection was to begin, a hearing was scheduled on Corces' motion to dismiss the charges against him. In its place, the District Court conducted approximately two hours of secret sidebar discussions with prosecutors, Corces and Corces' counsel. R148. As before, prior to holding these closed discussions, the District Court did not give notice that the motion (or whatever else was discussed) was to be heard in secret, afforded no opportunity for hearing to anyone opposing closure, and did not enter a written order stating the basis for its closure decision.

That same day, the District Court ordered the transcript of the two-hour conference sealed. R153.

B. The Proceedings Below.

Beginning in January 1992, Bruce Vielmetti ("Vielmetti"), a *St. Petersburg Times* reporter assigned to cover the federal courts in Tampa, wrote dozens of news stories about the Corces prosecution. *See, e.g.*, R155-59. On October 20, 1992, after being denied access to the transcript of the October 19 bench conference from which he was excluded, Vielmetti delivered a letter to Judge Kovachevich's chambers, in which, on behalf of himself and the Times, he requested first, that the transcript of the October 19 conference be unsealed and provided to

him and, second, that all further proceedings in this criminal case be held in open court. R153.

On October 21, 1992, the letter was returned to Vielmetti. *Id.* Attached to it was a note from a court clerk, prepared at the request of the Judge, which directed Vielmetti and the Times to "file a formal Motion" if they desired "to pursue" the matter. R154. Later that same day, the court conducted another closed bench conference with the parties. R149. Once again, the court failed to give notice of the closure, failed to give Vielmetti or anyone else a chance to be heard on the closure, and failed to articulate any reasons for the closure on the record.

On October 22, 1992, the court conducted additional *ex parte* discussions with attorneys concerning the prosecution of this case. No transcript of these proceedings has been made available.

At 8:37 a.m. on October 23, 1992, the Times filed its first Emergency Motion to Intervene and Unseal Court Records, and a request for an expedited hearing. R8. At approximately 1 p.m. that day, the court, at sidebar, commenced a hearing on the motion. R13. Upon oral request of prosecutors and Corces' counsel, however, the court postponed discussion of the merits until the following week. R33-34.

On October 26, 1992, the Times filed an Amended Emergency Motion to Intervene and Unseal Court Records and again requested an expedited hearing. R129. In its Amended Motion, the Times stated that, in derogation of the First Amendment and the common law, the actions of the trial court had stymied its efforts to obtain contemporaneous and complete information about this

federal corruption prosecution, and had thus deprived the public of information critical to its ability to monitor the federal justice system. A hearing on the Amended Motion was held beginning at approximately 10:30 a.m. the following day. R37-97.

At that hearing, the court declined to articulate specific reasons for the closures that already had taken place, stating that "sometimes . . . to articulate the basis will disclose what has occurred." R49.[3] Moreover, the court explicitly refused to assume its constitutionally required responsibilities with regard to closure, stating that:

> I think perhaps one of the ways *to get around that* [the requirement that specific findings as to the reasons for closure be made on the record] is to

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[3] The full extent of closure in the *Corces* case remains unknown. It was not until the Times complained that it learned that, in this case and others, the Middle District maintained two separate dockets: one of which was public, the other of which was itself under seal. Assuming that the sealed docket is numbered sequentially, it appears to contain at least 37 separate entries, only a dozen or so of which have ever been referred to publicly. Moreover, it was not until March, when the Eleventh Circuit (having reviewed the sealed materials at issue here) ruled in this case, that the Times learned of additional closures and sealed materials. *See In re Times Publishing Co.*, 987 F.2d at 710-11 (detailing closures); 3a-4a. (In that opinion, which is the basis for the Petition, the appellate court also held the trial court's maintenance of a dual-docketing system unconstitutional. *Id.* at 715; 14a-15a. The Times does not seek review of that portion of the decision.) In April, the Times learned that, without motion, notice or explanation, the Eleventh Circuit had decided to withhold mandate in this case. As a result, the Middle District has continued its practice of maintaining two separate dockets (one open, the other sealed) in this and other criminal cases.

> put the burden on the moving party to decide what he or she or it represents is the proper Constitutional Supreme Court tested nomenclature that should be used in the Clerk's minutes to identify that which is being requested to remain in camera, whether it's ex parte on behalf of the Government or ex parte on behalf of the Defendant.

R49. (Emphasis added). Apparently believing that *post facto* labels by themselves would ensure fulfillment of the substantive access requirements announced by this Court, the District Court subsequently announced that it would be its "task to label the public records [sic] in an articulated manner that will meet Constitutional muster, which we haven't done yet . . . [because] we haven't had time[,]" and ordered prosecutors to have their "labeling" completed by the following day. R78.

On October 28, 1992, the court publicly "labeled" the closed proceedings, stating:

> Well, as [defense counsel] could surmise, some of that which we have received certainly does relate to ongoing investigations, and that could not be released. Further matters that we might label specifically with regard to the Defendant Corces, on Monday, the Court's attempt to inform Mr. Corces, the Defendant, of his Constitutional Rights, and that's on October 19th, and on Wednesday, October the 21st, labeling that the exercise of Constitutional Rights by the Defendant.

R106. Perhaps sensing that this classification system might not satisfy constitutional requirements, the court then announced its intention to "seek further advice" by

"in camera certify[ing] questions to the Eleventh Circuit Court of Appeals." R106-07. These questions, which were to be transmitted via "secret pouch," R57, were sent, according to the court, so that the appellate court would have the opportunity to "deal with this matter in toto and provide advice to [the trial] court with regard to this situation. . . . " R107. Neither the questions themselves, nor any information about what they concerned, was provided to the Times. *See* R109.

On October 29, 1992, the District Court granted that portion of the Times' Amended Motion in which it sought permission to intervene in this case. 24a.[4] The court declined, however, to issue a decision either way regarding the Times' request for access to the sealed materials, forestalling the Times' ability to seek access to the materials by way of emergency appeal.

Jury selection in the case began the following Monday, November 2, 1992.

That same day, the Times filed a Petition for a Writ of Mandamus in the United States Court of Appeals for the Eleventh Circuit, in which it requested that the District Court be directed to grant or deny the Times' motion for access. Additionally, the Times applied to the trial court for a stay of all proceedings in the *Corces* case pending a ruling from the Eleventh Circuit on its Petition for a Writ. R10. The District Court denied the application, based on its judgment that "lack of access to [the documents

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[4] The court also granted a companion motion filed by The Tribune Company, which publishes the *Tampa Tribune*. The Tribune Company did not pursue an appeal in this matter.

requested by the Times] poses no impediment to the media coverage of the trial." R144; 26a. Jury selection went forward as scheduled.

On November 3, 1992, the Eleventh Circuit declined to rule on the District Court's certified questions. On the same day, a jury was empaneled.

At 4:40 p.m. on November 6, 1992 – fourteen days after the Times first moved the court for access to sealed transcripts and closed proceedings in the *Corces* trial – the District Court issued an order denying the motion. 16a. In its order, the court described the requested materials and held that:

> . . . in regard to each *in camera* proceeding listed previously, except for the Docket S-9, exposure of those proceedings will result in a substantial probability of irreparable damage to a compelling interest (i.e., protection of continuing law enforcement investigations), that the alternative to closure will not adequately protect that interest and that there is a substantial probability that closure will be effective in protecting the harm feared by the moving party.
>
> As to the remaining procedure (Docket S-9), the Court finds that disclosure of that information is governed by 18 U.S.C. § 3153(c)(1). The motion for access will be denied based on the compelling and legitimate interest in sustaining the closure of the proceedings.

21a-22a.

The Times noted an appeal of this ruling on Monday, November 9, 1992, and, on November 12, 1992, filed a Petition for Writ of Mandamus or, in the Alternative,

Expedited Appeal in the Eleventh Circuit. That same day, the Times moved the appellate court for expedited review. The motion was granted on November 13, 1992.

On March 17, 1993, a three-judge panel of the Eleventh Circuit affirmed the trial court's denial of access in the proceedings below, and further held that:

> The opportunity for the press and the public to be heard on the question of their exclusion "extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public."

In re Times Publishing Co., 987 F.2d at 713 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979)[Powell, J., concurring]); 9a.

C. The Basis for Federal Jurisdiction

As the public's surrogate in courtrooms throughout the area, the Times recognizes its constitutionally based responsibility to bring timely, accurate and complete information about the judicial system to the citizens of West Central Florida. In seeking to fulfill that responsibility, the Times, on numerous occasions, has moved to intervene and gain access to criminal and civil proceedings in both the state and federal courts. These motions uniformly have been made and pursued on the basis of the Times' right, guaranteed by the First Amendment, to witness what takes place in the courtrooms of this country.

The motions and briefs filed in this case were no exception. From the beginning, the Times has based its arguments on the First Amendment, and on the substantive right of access to judicial proceedings that provision of the Constitution guarantees. This constitutionally grounded substantive right carries with it, the Times has argued, a concomitant procedural component. Specifically, the right to witness criminal proceedings presumes the right not to be excluded from them without notice sufficient to provide an opportunity for meaningful hearing.

The principal purpose of this Petition is to ensure that the substantive right endorsed by this Court in a quartet of cases dating back more than a decade (and decided subsequent to *Gannett Co. v. DePasquale*, upon which the Eleventh Circuit relied) will not be diminished by insensitive procedural rules such as that announced below. In placing an affirmative duty on the press and public to *acquire* notice of closure, rather than placing responsibility on those seeking closure to *give* it, the Eleventh Circuit has placed an untenable burden on the press and public, one that could effectively foreclose their ability to exercise what has been recognized by this Court as a right fundamental to enlightened self-governance. For this reason, and because the appellate court's procedural pronouncement expressly and directly conflicts with recent decisions in six other Circuit Courts of Appeals, the Times respectfully requests that this Court grant its Petition, reverse the decision below, and take

this opportunity to resolve the conflict in the federal appellate courts.[5]

REASON FOR GRANTING THE WRIT

The First Amendment Requires That, Before Closure of a Criminal Proceeding Can Lawfully Be Ordered, the Press and the Public Be Given Adequate Notice of the Proposed Closure and a Meaningful Opportunity to Be Heard on the Question of Their Exclusion.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992). Yet, thirteen years after this Court's self-proclaimed "watershed" ruling in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring) that "the right to attend criminal trials is implicit in the guarantees of the First Amendment," *id.* at 580, the "uncertainty mark[ing] the nature – and strictness – of the [procedural] standard" governing enforcement of that fundamental liberty remains. *See id.* at 603 (Blackmun, J., concurring in judgment). Thus, while it is now beyond debate that, absent exigent reasons for closure articulated on the record, "the trial of a criminal case must be open to the public," *United States v. Byrd*, 812 F. Supp. 76, 78 (D.S.C. 1993), doubt remains as to how, and under what

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[5] Review of this case is appropriate at this time, because, as a constitutional challenge to binding procedural standards announced by a federal Circuit Court, the controversy here is "capable of repetition." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). Moreover, the criminal proceeding at the heart of this case ended in a mistrial, and the retrial has not yet taken place.

circumstances, those findings are to be fashioned. Specifically, a majority of the federal appellate courts have now considered procedural requirements for notice, and are divided as to what kind of notice must be provided before a proposed closure may be ordered, and as to whom and when notice must be given. Absent intervention and guidance from this Court, the confusion and disagreement permeating the federal judiciary on this issue may abrade the cherished right their conflicting procedural rules were implemented to protect.

A. Historically, this Court Has Not Hesitated to Create Procedural Rules In Order to Safeguard Substantive Constitutional Rights.

"The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring). Indeed, as this Court recognized more than 30 years ago, "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). This is particularly true of those rights guaranteed by the First Amendment, a "sensitive field," *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968), where procedural rules "assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser*, 357 U.S. at 520.[6]

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[6] In devising procedural safeguards for rights protected by the First Amendment, this Court often "has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, [and] instead has turned directly to the first

B. A Majority of the United States Circuit Courts of Appeals Have Considered the Procedural Requirements for Closure and Disagree As to What Those Requirements Are.

The open courtroom, as this Court has recognized, is the "handmaiden of effective judicial administration, especially in the criminal field," *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), because public scrutiny of judicial proceedings "enhances the quality and safeguards the integrity of [] factfinding," thus "foster[ing] an appearance of fairness, [and] heightening public respect for the

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amendment as the source of rules," creating what one commentator has characterized as a First Amendment right of due process. *See* H.P. Monaghan, *First Amendment 'Due Process,'* 83 Harv. L. Rev. 518 (1970). *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (First Amendment requires shifting the burden of proof on the issue of truth or falsity from defendant to plaintiff in libel cases); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (First Amendment requires raising the evidentiary standard necessary to defeat defense motion for summary judgment in libel cases); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (First Amendment requires finding that the "clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure, does not apply to appellate review of libel cases involving determination of actual malice); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (First Amendment requires determination that jury in libel lawsuit may not decide relevance of defamatory statement to plaintiff's status as a public figure); *Carroll*, 393 U.S. at 183 (First Amendment requires that judicial orders which have an impact on First Amendment rights must, consistent with that amendment, be narrowly tailored to achieve a specific objective); *Freedman v. Maryland*, 380 U.S. 51 (1965) (First Amendment requires that judicial, rather than merely administrative, review be had on issue of obscenity).

judicial process." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). As a result, access to courtrooms and judicial proceedings is central to ordered democracy. *See Globe Newspaper*, 457 U.S. at 605 (citation omitted) (the right of access to judicial proceedings "ensure[s] that [the] constitutionally protected 'discussion of governmental affairs' is an informed one"); *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (open judicial proceedings are crucial to "our free and democratic government"); *United States v. Peters*, 754 F.2d 753, 758 (7th Cir. 1985) (citation omitted) ("the right to attend criminal trials . . . is implied from the first amendment's 'core purpose' of assuring free public discussion"). As this Court has held:

> The value of openness lies in the fact that people not actually attending [criminal] trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise v. Superior Court, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*") (emphasis supplied by the Court). *See Ex Parte Drawbraugh*, 2 App. D.C. 404, 407 (1894) ("Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access"). In short, the right of access to this nation's courts is firmly rooted in the Constitution and the common law, and has

become so entrenched as to be recognized as an integral part of American jurisprudence: "public access is an indispensable element of the trial process itself [and] [t]rial access, therefore, assumes structural importance in our 'government of laws[.]' " *Richmond Newspapers*, 448 U.S. at 597 (Brennan, J., concurring) (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)). That members of the press, such as the Times, have a critical role in this "essential" process is also beyond debate, for, as this Court noted in *Richmond Newspapers*: " 'One of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there. . . . ' " 448 U.S. at 573-74 n.9 (citation omitted).

Thus, as this Court repeatedly has held, restrictions on the right of the press (or the public it serves) to witness judicial proceedings are permissible only rarely, and then only after notice of the proposed closure has been given *and* interested parties have had the opportunity to be heard *and* specific, compelling reasons for closure have been articulated on the record *and* determinations have been made by the trial court that closure is as narrowly tailored as possible to protect the compelling interests asserted. *See Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper Co.*, 457 U.S. at 606-07.

Left undescribed by *Richmond Newspapers* and the trio of decisions examining the breadth of the *substantive* rights of access it conferred, however, were rules detailing what *procedures* courts should follow in order to safeguard them. As the United States Court of Appeals for the Second Circuit observed in 1984:

> The case law on the procedural aspects of a right of access is, as yet, no clearer than what has emerged on the substantive aspects. A footnote to the majority opinion in *Globe Newspaper Co.* states that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion,' ". . . . The means of affording that opportunity remain uncertain.

In re The Herald Co., 734 F.2d 93, 101 (2d Cir. 1984) (quoting *Globe Newspaper*, 457 U.S. at 609 n.25, citing *Gannett*, 443 U.S. at 401 (Powell, J, concurring)). *Cf. United States v. Criden*, 675 F.2d 550, 558 (3d Cir. 1982) (citation omitted) ("We believe that due process requires some notice to the public before a trial court may close a . . . criminal proceeding. . . . That some notice is required, however, does not tell us the form that such notice should take").

Today, nearly a decade after *In re The Herald* was handed down, uncertainty remains. Yet, just as this Court and the federal circuits have gradually refined the test for determining to which types of proceedings the First Amendment right of access attaches, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*") ("[i]f the particular proceeding in question passes the[] tests of experience and logic, a qualified right of public access attaches"), so, too, have a majority of the federal circuits considered and adopted procedural rules for determining under what circumstances an attached right of access may be overcome. The problem, as is true with many such common law developments, is that, being recent in vintage, the procedural rules now are in conflict. *Cf.* O.W. Holmes, *The Common Law and Other*

Writings 1 (1881) ("The life of the law has not been logic: it has been experience").

Indeed, perhaps the most salient unifying feature of the procedural rules endorsed by the other circuits is that, without exception, they differ significantly from that announced in March 1993 by the Eleventh Circuit. *Compare In re Times Publishing Co.*, 987 F.2d at 713 (quoting *Gannett*, 443 U.S. at 401 [Powell, J., concurring]) ("The opportunity for the press and the public to be heard on the question of their exclusion 'extends no farther than the persons actually present at the time the motion for closure is made. . . . ' ") *with The Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (emphasis added) (when closure is sought, written motions must be filed and "notice of th[e] motion must be entered in the public docket;" additionally, "[t]he trial court must promptly allow interested persons an opportunity to be heard *before* ruling on the motion"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (quoting *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984)) (procedural prerequisites to closure "must be followed[,]" including the requirement that the trial court "give the public adequate notice that the closure of a hearing or the sealing of documents may be ordered[;]" "closure motions must be 'docketed reasonably in advance of their disposition' " and " 'when the district court has been made aware of the desire of specific members of the public to be present, reasonable steps to afford them an opportunity to submit their views should be taken before closure' "); *In re The Herald Co.*, 734 F.2d at 102-03 ("a motion for courtroom closure should be docketed in the public docket files[;]" entries on the docket should be

made "prompt[ly]" and should be "detailed"); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-76 (6th Cir. 1983) (citing *United States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982), and quoting *Criden*, 675 F.2d at 559) (requiring public docketing of a motion for closure and, where the motion is one to seal a record, the filing of a written motion "'sufficiently in advance of any hearing on or disposition of the [motion] to afford interested members of the public an opportunity to intervene and present their views to the court[]'"); *Brooklier*, 685 F.2d at 1168 ("reasonable steps should be taken to afford [interested parties] an opportunity to submit their views to the court before exclusion is accomplished"); *Criden*, 675 F.2d at 559 (requiring that "some notice . . . be given that is calculated to inform the public that its constitutional rights may be implicated in a particular criminal proceeding[;]" and further requiring that "docketing of [motions for closure be completed] sufficiently in advance of any hearing on or disposition of the closure motion").[7]

Besides presenting a series of obvious conflicts with the rule chosen by the Eleventh Circuit, the procedural prerequisites selected by the other federal circuits share one additional common theme. Specifically, unlike the rule announced below, those in the other circuits comport, to one degree or another, with the structural, due

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[7] Significantly, the Second and Third Circuits have explicitly *rejected* the procedural rule adopted by the Eleventh Circuit, *see, e.g., In re The Herald*, 734 F.2d at 102 and *Criden*, 675 F.2d at 559, while, without rejecting it, the Ninth Circuit has held that the rule adopted below is simply inadequate by itself to protect the First Amendment interests involved, *see Brooklier*, 685 F.2d at 1168.

process-based values implicit in any requirement that notice be given: that is, that notice be adequate to ensure that interested parties are afforded a right to be heard, *through counsel,* before being deprived of a constitutional right. *Cf. Gannett,* 443 U.S. at 392-93. As this Court explained in the seminal *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950) (emphasis added; citations omitted):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* * * * The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance,. . . . * * * The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . .

Process comprising "a mere gesture," this Court held, simply is not sufficient. *Id.* at 315. The guarantee of a hearing is meaningless to those who do not know one is necessary or available.[8] This is the essential error of the rule announced by the Eleventh Circuit.

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[8] Constitutionally appropriate "findings" of the basis for a particular closure order would also seem to be impossible absent the participation of all interested parties. *See Carroll,* 393 U.S. at 183-84, where this Court held that:

C. The Procedural Rule Adopted by the Eleventh Circuit Imperils the Constitutional Right of Access Held By the Public and Ignores the Realities of Traditional Newsgathering.

As the Eleventh Circuit itself previously has recognized, what must be considered at any time closure is sought are "the rights of the public, an absent third party." *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985).[9] This would seem particularly appropriate in the context of the prosecution of two officers of the court – a state prosecutor and a criminal defense attorney – on corruption charges, a subject that

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> . . . An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.

[9] That the District Court did not take these absent third parties into account is clear. *See, e.g.*, R30 (where, in an exchange with counsel during the October 23, 1992 hearing, the court stated: "I will tell you that if I feel any of you are going to start to interfere with the Constitutional rights and responsibilities of the Court, interfering with a fair trial to Mr. Corces, a fair trial to the Government, and a fair opportunity for the trier of fact, namely, the Jury to hear that only which they should be hearing and not to be adversely affected by things that they should not be hearing, then folks, that's going to be a little different matter").

calls the legitimacy of the entire justice system in Florida into question. Yet it is precisely those rights (and the public interests they serve) that are left unguarded under the procedural rule announced below. For, as the Second Circuit has noted, "by its nature the right of public access is shared broadly by those not parties to the litigation . . . [and] it seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure." *In re The Herald Co.*, 734 F.2d at 102.

Nor is this elemental inadequacy cured by leaving responsibility for vigilance in the hands of the press, despite its well earned role as the public's "surrogate" in America's courtrooms. *See Richmond Newspapers*, 448 U.S. at 572-73. For in order to avoid forfeiture of their right of access, under the procedural rule adopted by the Eleventh Circuit, news reporters here not only would be required to monitor, in person, proceedings being conducted in every courtroom in every courthouse, but, further, would be forced to lurk in hallways and " 'camp out' " in courthouses so as to "ascertain whether . . . proceedings [were] being conducted in chambers." *Criden*, 675 F.2d at 559. *See Brooklier*, 685 F.2d at 1168 (citing *Criden*, 675 F.2d at 559) ("[c]losure may be suggested to the trial judge in writing or during an in-chambers conference . . . "). Deprivation of an important constitutional right is too high a penalty to pay for lack of news foresight or something as seemingly inconsequential as a news reporter's inopportune absence at the critical moment.

Moreover, while it is true that many judicial proceedings, whatever their venue, are not of sufficient interest to attract spectators from the public or the press, this does

not mean, as the Second Circuit has recognized, "that there is lacking a significant public interest in later seeking access to the transcript of a closed hearing [occurring in one of these cases] or testing on appeal the validity of a closure order [entered in one of these cases]." *In re The Herald Co.*, 734 F.2d at 102. Under the rule announced by the Eleventh Circuit, however, neither access nor appeal would be available, because anyone absent from the particular hearing forfeits his right to present an opposing view.

Indeed, pursuant to the Eleventh Circuit's rule, had *St. Petersburg Times* reporter Bruce Vielmetti not been present when the October 19 closed sidebar took place, it is possible neither the newspaper nor its readers would ever have learned either the fact or extent of the abundant secrecy permeating the *Corces* prosecution. But neither Vielmetti, nor even all the reporters employed by all the newspapers and radio and television stations in America, can monitor every judicial proceeding occurring in every one of this country's courthouses.[10]

Nor should they be required to do so, for "[i]f the press is to fulfill its function of surrogate, it surely cannot

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[10] The Times, the second largest newspaper in Florida, has but *one* reporter assigned to cover the federal courts. Many smaller newspapers, and most television and radio stations, cannot even afford this luxury. Yet, according to federal statistics, there were 9,818 civil cases and 45,639 criminal cases pending in the federal courts alone last year. Analysis and Reports Branch, Administrative Office of the United States Court, *Statistical Tables for the Twelve Month Period Ended December 31, 1992* Table C-D (1993). No news organization in America has the resources to monitor this boundless sea.

be restricted to report on only those judicial proceedings that it is has sufficient personnel to cover contemporaneously." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 504 (1st Cir. 1989). *See also Richmond Newspapers*, 448 U.S. at 572-73 ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public").

Those who desire to exercise basic constitutional rights should not be required to shoulder the burden of enforcing them.

D. The Procedural Rule Adopted Below Invites Abuse.

As the conduct of the criminal trial below demonstrates, the constitutionally infirm procedure embraced by the Eleventh Circuit invites abuse. Though this Court has recognized that secrecy is "profoundly inimical" to the trial process, *see Richmond Newspapers*, 448 at 595 (Brennan, J., concurring), legions of proceedings in this public corruption prosecution were concealed from public view, their very happening unknown to anyone except the parties, or, occasionally, to prosecutors and the Judge alone. *See In re Times Publishing Co.*, 987 F.2d at 710-11; 3a-4a. No one had any opportunity to object to these potential violations of the Constitution, however, because, pursuant to the rule embraced by the Eleventh Circuit, no outsiders were present when they took place, and no notice was required, let alone given, which would have informed interested outsiders, including the Times, of their occurrence.

Thus, repeated closures of the proceedings in a public corruption prosecution were permitted not with public notice, public hearing, recorded findings and specially tailored solutions, but, rather, behind a Star Chambered wall of silence.[11]

Nor was this constitutional deficiency rectified by the District Court's subsequent superficial adherence to the dictates of *Press-Enterprise I*. *See In re Times Publishing Co.*,

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[11] It is incorrect to suggest, as the Eleventh Circuit nevertheless does, that "The *Times* argues that the district court's ruling is inadequate under the standards of *Press-Enterprise I* because protection of an ongoing law enforcement investigation is not a recognized compelling interest." *In re Times Publishing Co.* 987 F.2d at 714; 12a. At no point in the proceedings below did the Times suggest that the government might not be able to demonstrate a compelling need to keep certain law enforcement activities secret for particular periods. Rather, in its initial brief to the appellate court – which dealt almost exclusively with the endemic procedural deficiencies in the *Corces* case – the Times argued that reversal of the trial court's order would be proper because (a) the order was entirely conclusory and thus insufficient as a matter of law; (b) the order failed to state what, if any, alternatives to closure it had considered, rendering it, pursuant to *Press-Enterprise I*, 464 U.S. at 511, insufficient as a matter of law; (c) the order failed to state what the harm was that faced the moving party, rendering it, pursuant to *Press-Enterprise II*, 478 U.S. at 15, insufficient as a matter of law; (d) the order made no provision whatsoever for subsequent release of the transcripts of the closed proceedings, rendering it, under both *Press-Enterprise I*, 464 U.S. at 512 and the Justice Department's own guidelines, 28 C.F.R. § 50.9(c), insufficient as a matter of law; and (e) the order relied, in some measure, on the precatory language of a federal statute, rendering it, as a matter of constitutional jurisprudence, insufficient, in that, pursuant to the First Amendment, Congress lacks the authority to enact law that "trumps" First Amendment rights.

987 F.2d at 714; 11a (emphasis added) ("Our holding [that the procedures followed by the District Court passed constitutional muster] is bolstered in this case because the district court afforded the *Times* an opportunity to be heard on the *release of the transcripts* within a *reasonable time*").[12] In rendering this judgment, the Eleventh Circuit failed to consider that a hearing on the *release of the transcripts* held as long as *10 months* after some of them were created (and subsequent to appellate delay) would not have been necessary had the District Court, at the appropriate times throughout these proceedings, given notice that closure was sought before closure was granted. Equally important, the Eleventh Circuit's decision ignores the value of contemporaneous review.

Central among the "strong considerations" underscoring the right of access is the crucial role played by the press in informing the public about the administration of

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[12] The materials sought by the Times (and denied by the Court) include the transcript of one proceeding which prosecutors, who had requested closure, stipulated could be released. R69-71. Nevertheless, solely on grounds that Corces objected to "piecemeal" disclosure of sealed files, the District Court denied the Times' request for access to this transcript. *Id. Compare El Vocero de Puerto Rico*, 113 S. Ct. 2004 (1993) (citing *Press-Enterprise II*, 478 U.S. at 12) (holding unconstitutional a procedural rule "allowing hearings to be closed upon the request of the defendant, without more"). *See generally Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [and] if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do").

justice so that it can effectively "oversee[] . . . the criminal justice process." *Robinson*, 935 F.2d at 287. The public cannot effectively perform this duty, the District of Columbia Circuit noted, absent "contemporaneous access" to information. *Id. See Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (citation omitted) (" 'contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power' "); *Gannett Co.*, 443 U.S. at 442 n.17 (Blackmun, J., concurring in part and dissenting in part) ("although a record is kept for later release, when the proceeding itself is kept secret, it is impossible to know what it would have been like had the pressure of publicity been brought to bear on the parties during the proceeding itself").

As Jeremy Bentham recognized more than 160 years ago:

> . . . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, – that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

J. Bentham, I *Rationale of Judicial Evidence* 524, *quoted in In re Oliver*, 333 U.S. 257, 271 (1948).

CONCLUSION

"Speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986). Restrictions on such speech, whatever their form and however carried out, thus pierce the heart of First Amendment values. This is particularly true in the context of a federal criminal prosecution of a defense attorney and a state prosecutor, where the actions of the court and the parties could either inspire or destroy public confidence in the fairness of the administration of our criminal laws. The case below is a paradigm for openness and limelight, but has been conducted in whispers, behind closed doors – behavior that may "breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges," prosecutors, lawyers and the entire legal system. *See Nebraska Press Association*, 427 U.S. at 587.

This type of secrecy, sanctioned by procedure, is no less inimical than secrecy enforced by substance.

For all these reasons, Petitioner Times Publishing Company respectfully requests that this Court grant its Petition for Writ of Certiorari, reverse the decision of the Eleventh Circuit, and take this opportunity to announce a procedural rule ensuring that adequate, meaningful

notice will be provided to all interested parties before closure of judicial proceedings is permitted.

Respectfully submitted,

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APPENDIX*

UNITED STATES of America,
Plaintiff-Appellee,

v.

John VALENTI and Charles Corces, Defendants,

Times Publishing Company,
Intervenor-Appellant.

In re TIMES PUBLISHING COMPANY, Petitioner.

Nos. 92-3125, 92-3128.

United States Court of Appeals,
Eleventh Circuit.

March 17, 1993.

Newspaper filed motion to intervene in criminal proceeding for the limited purpose of seeking to unseal disputed court record. The United States District Court for the Middle District of Florida, No. 92-28-CR-T-17C, Elizabeth A. Kovachevich, J., denied motion, and newspaper appealed. Newspaper also filed petition for writ of mandamus challenging Middle District's maintenance of dual dockets. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) appeal was not moot; (2) there was no error in district court's exercise of judicial authority to conduct closed bench conferences, where court later allowed press opportunity to be heard on release of transcripts to closed proceedings within a reasonable time; (3)

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* Any typographical error or incorrect punctuation found in the following Appendix was left intentionally to show accurately how the original documents appeared.

district court's denial of newspaper's emergency motion to unseal transcripts of closed bench conferences and in camera motions were not improper; and (4) use of public and sealed docket to note criminal proceedings was an unconstitutional infringement of right of public and press to seek release of in camera motions and transcripts of closed bench conferences.

Affirmed.

George K. Rahdert, Rahdert & Anderson, St. Petersburg, FL, for intervenor-appellant.

Vicki Johnson, Asst. U.S. Atty., Tampa, FL, for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

On Petition for Writ of Mandamus for the United States District Court for the Middle District of Florida.

Before FAY and HATCHETT, Circuit Judges, and DYER, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this appeal involving important First Amendment issues, we survey the law regarding the closure of criminal proceedings, and hold unconstitutional the Middle District of Florida's sealed docket in criminal cases.

BACKGROUND

On January 29, 1992, a grand jury indicted a Tampa, Florida criminal defense lawyer, Charles Corces, and an

assistant state attorney, John Valenti, on charges of conspiracy, extortion, and bribery. The charges related to a previous state indictment for Corces's alleged bribery of Valenti in order to gain favorable treatment for criminal defendants in pending state prosecutions. Following the federal indictment, the state dismissed its indictment against Corces and Valenti.

Several months before trial, closed proceedings took place in the district court, including: (1) a February 14, 1992 partially *ex parte,* closed bench conference between the prosecutor and the district court, which resulted in a postponement of the trial date to May, 1992; (2) the government's March 18, 1992 *ex parte, in camera* motion; (3) the government's April 22, 1992, *ex parte, in camera* motion requesting a second continuance of the trial; (4) an August 13, 1992 closed conference between the prosecutor, defense counsel, and Corces before a United States Magistrate Judge; (5) the government's October 16, 1992 *in camera* motion; (6) an October 19, 1992 closed bench conference in open court, between the prosecutor, Corces, and defense counsel; (7) an October 19, 1992 *ex parte,* closed bench conference with the government; (8) an October 19, 1992 closed bench conference with the prosecutor, Corces, and defense counsel where the government disclosed the contents of the earlier *ex parte* discussions; (9) an October 21, 1992 closed bench conference with the prosecutor, Corces and his counsel; (10) an October 21, 1992 closed bench conference where Corces filed under seal certain exhibits, which he had received *in camera* from the government; (11) an October 22, 1992 *in camera* proceeding where the district court heard testimony of an Assistant United States Attorney; (12) an

October 22, 1992 *ex parte,* closed bench conference with the prosecutor; and (13) an October 15, 1992 *in camera* motion that the government filed seeking protection to discovery materials.

On October 20, 1992, a *St. Petersburg Times (Times)* news reporter delivered a letter to the district court requesting transcripts of the October 19, 1992 proceedings be made available to the public, and requesting that all further proceedings be held in open court. On October 21, 1992, the district court returned the reporter's letter with a note from the clerk of the court directing the reporter to file a formal motion on these requests. On October 23, 1992, the *Times* filed an Emergency Motion to Intervene and Unseal Court Records and Request for Expedited Hearing ("emergency motion"). On October 26, 1992, the *Times* filed its Amended Emergency Motion, claiming that the district court had stymied its efforts to obtain accurate and timely information about the public corruption prosecution in violation of the Constitution and the common law.

On October 29, 1992, the district court granted the portion of *Times's* emergency motion seeking to intervene for the limited purpose of seeking to unseal the disputed court records. The district court also filed *in camera* certified questions to this court. On November 3, 1992, this court notified the district court that it would transfer the filing to the miscellaneous docket without further action because the law provides no basis for a response to the filing.

On November 6, 1992, the district court denied that portion of the *Times's* emergency motion seeking to

unseal court records. The district court also directed the clerk of the United States District Court for the Middle District of Florida ("Middle District") to annotate any further closed proceedings in this case on the Middle District's public docket, rather than the usual annotations made only on the sealed docket.

ISSUES AND CONTENTIONS

The *Times* contends that the district court erred in conducting closed proceedings without first providing the public and press notice and opportunity to be heard, and articulating specific findings that justified closure of portions of the underlying criminal proceeding. The *Times* also contends that the district court erred in denying its emergency motion to unseal transcripts of previously held closed proceedings and several *in camera* documents. Additionally, the *Times* petitions this court to issue a writ of mandamus, ordering the Middle District not to continue using both a public and a sealed docket in criminal proceedings. The government agrees that this case is not moot merely because the underlying trial has concluded in a mistrial. The government contends, however, that this court has no jurisdiction to review the use of a dual-docketing system in the Middle District because the district court has already fashioned a remedy in this case. In addition, the government contends that the district court did not abuse its traditional discretion to conduct closed bench conferences and properly denied the *Times's* emergency motion to unseal the disputed transcripts and *in camera* documents. We address these contentions separately.

APPELLATE JURISDICTION

We first note the *Times's* standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party. *See In re Petition of Tribune Co. v. United States*, 784 F.2d 1518, 1521 (11th Cir.1986); *Newman v. Graddick*, 696 F.2d 796, 799-800 (11th Cir.1983). "An order denying access is not only reviewable by this court but is immediately reviewable regardless of the pendency of the underlying action." *In re Petition of Tribune*, 784 F.2d at 1521; *see Newman*, 696 F.2d at 800 (recognizing that orders denying press access and ongoing litigation are appealable under the collateral order doctrine). Although the *Times's* standing to seek immediate review is not contended, the parties disagree about the applicability of the mootness doctrine and its exceptions to this case.

The *Times* argues that this is a model case of the kind of constitutional wrong that is capable of repetition yet evading review. The government concedes that this case is not moot merely because the underlying prosecution has come to a conclusion, but argues that the "capable of repetition, yet evading review" exception to the mootness doctrine is inapplicable because the case is not yet moot. Rather, the government argues that the controversy in this case remains alive since the requested records remain sealed.

The *Times* requests relief broader in scope than merely unsealing the transcripts of closed proceedings in this case. The *Times* also challenges the procedures for closure followed in the district court, and requests this

court to strike the Middle District's dual-docketing system. Thus, the district court's November 6, 1992 order does moot that portion of this case relating to the district court's procedures for closure and its maintenance of a dual-docketing system. The district court directed the clerk to annotate any future closed proceedings on the public docket "in this particular case." The district court's order makes it clear that the instructions for complete public docketing apply only to this case.

Because this case presents a controversy capable of repetition yet evading review, we hold that mootness does not bar our review of the *Times*'s claims against the dual-docketing system. *See Newman*, 696 F.2d at 800 (holding that mootness is not bar to review of a district court's order denying a newspaper access to judicial records and hearing, based in part on the district court's plans to maintain its policy of occasionally excluding the public and the press). Accordingly, we have jurisdiction to consider the merits of the *Times*'s claims relating to closure procedures, the maintenance of the dual-docketing system, and the motion to unseal the closed proceedings in this case.

DISCUSSION

Prerequisites for Closure of Judicial Proceedings

The public and the press have a qualified constitutional right to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). The Supreme Court has emphasized the following two considerations for determining whether a First Amendment right of access

attaches to a particular process within a criminal proceeding: (1) "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8-9, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*) (holding that the right of public access attaches to preliminary hearings based on these considerations); *see also Press Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501, 509, 104 S.Ct. 819, 823-24, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*) (holding that the right of public access attaches to the selection of jurors based on these considerations). "But even when a right of access attaches, it is not absolute." *Press-Enterprise II*, 478 U.S. at 9, 106 S.Ct. at 2740-41; *see also Press-Enterprise I*, 464 U.S. at 509, 104 S.Ct. at 823-24 (recognizing that "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness").

Thus, in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. at 824 (stating that the lower court must articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered"); *see Newman*, 696 F.2d at 802; *see also Globe Newspaper Co.*, 457

U.S. at 609 n. 25, 102 S.Ct. at 2620 n. 25 (recognizing that representatives of the press and the general public " 'must be given an opportunity to be heard on the question of their exclusion' "); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 401, 99 S.Ct. 2898, 2916, 61 L.Ed.2d 608 (1979) (Powell, J., concurring) (same). The opportunity for the press and the public to be heard on the question of their exclusion "extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public." *See Gannett*, 443 U.S. at 401, 99 S.Ct. at 2916.

(i) Closed Bench Conferences

The *Times* argues that the district court completely ignored the *Press-Enterprise I* and *Newman* procedural requirements before conducting closed bench conferences. The government responds that the district court properly exercised its traditional authority to conduct closed bench conferences, especially where closure protects sensitive information concerning an ongoing criminal investigation. The government also argues that the district court's subsequent hearing and order on the *Times*'s emergency motion was adequate to satisfy the principles articulated in *Press-Enterprise I* and *Newman*.

Contrary to the *Times*'s argument, we do not interpret *Press-Enterprise I* to require a trial court to articulate findings that a closed bench conference is necessary and narrowly tailored to preserve higher values *before* a closed bench conference occurs. Instead, *Press-Enterprise* notes that a court may conduct an *in camera* conference on the

record where the "constitutional value sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." *Press-Enterprise I*, 464 U.S. at 512, 104 S.Ct. at 825. In this process, the trial court balances the right of access against the interest in maintaining a sealed transcript. *Press-Enterprise I*, 464 U.S. at 512, 104 S.Ct. at 825. In placing a duty on the trial court to balance competing interests and make findings *after* the occurrence of a closed bench conference, the Court in *Press-Enterprise I* articulated a workable procedure to accommodate the public's right of access and the long recognized authority of a trial court to conduct bench conferences outside of public hearing. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n. 25, 102 S.Ct. 2613, 2620 n. 25, 73 L.Ed.2d 248 (1982) (holding that a trial court has traditional authority to conduct *in camera* conferences); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 2839 n. 23, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring) (stating that "the presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interest of decorum," including the exclusion of the public and the press from conferences at the bench and in chambers where such conferences are distinct from trial proceedings); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir.1977) (holding that "bench conferences between judge and counsel outside of public hearing are an established practice, . . . and protection of their privacy is generally within the court's discretion. . . . Such conferences are an integral part of the internal management of a trial, and screening them from access by the

press is well within a trial judge's broad discretion"), *cert. denied, Miami Herald Publishing Co. v. Krentzman*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978), *overruled in part on other grounds, Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Thus, we find no error in the district court's exercise of its traditional authority to conduct closed bench conferences. Our holding on this issue is bolstered in this case because the district court afforded the *Times* an opportunity to be heard on the release of the transcripts within a reasonable time.[1]

(ii) Sealed Transcripts and *In Camera* Motions

Even where a court properly denies the public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed. *See Gannett*, 443 U.S. at 393, 400, 99 S.Ct. at 2912, 2916. Thus, we review the district court's November 6, 1992 order denying the *Times*'s emergency motion to unseal under the standards established in *Press-Enterprise I. See United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir.1982) (holding that the denial of a motion to release transcripts of closed proceedings must itself satisfy the requirements for a denial of a right of access protected under the First Amendment). Accordingly, the district court's denial of the motion to unseal must be supported with a finding

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[1] Our holding also provides a workable method and a common sense solution to the closure problem. After all, a trial judge cannot rule intelligently until some information has been disclosed.

that the denial of access is necessary to preserve higher values, and is narrowly tailored to serve that interest. *See Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. at 824.

In its November 6, 1992 order, the district court identified the substantial probability of irreparable damage to a continuing law enforcement investigation as the compelling interest requiring a denial of the *Times*'s motion for access to the *in camera* motions and the transcripts of the closed proceedings. The district court also ruled that "the alternative to closure will not adequately protect that interest and that there is a substantial probability that closure will be effective in protecting against the harm feared by the moving party." The *Times* argues that the district court's ruling is inadequate under the standard in *Press-Enterprise I* because protection of an ongoing law enforcement investigation is not a recognized compelling interest.[2] The *Times* also argues that the district court erred in failing to identify the alternatives to closure that it considered and rejected.[3]

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[2] We find the *Times*'s argument that the district court erred in relying on 18 U.S.C. § 3153(c)(1) to find a compelling and legitimate interest in sustaining a seal on the closed proceeding before the magistrate judge, to be completely without merit and warrants no discussion. *See* 18 U.S.C. § 3153(c)(1) & (2) (1985).

[3] In addition, the *Times* argues that the district court's order is not narrowly tailored based on the absence of a ruling on how long the transcripts and *in camera* motions must remain sealed. This issue is not properly before this court because, as the *Times* concedes, the district court's November 6, 1992 order is silent on the time length of the seal. It would be premature for this court to consider a claim that the district court erred in permanently sealing the disputed motions and transcripts in the absence of such a ruling from the district court. Based on the November 6,

Based on our review of the sealed motions and transcripts, we hold that the district court properly denied the *Times*'s emergency motion to unseal as a necessary means to achieving the government's compelling interest in the protection of a continuing law enforcement investigation. *See In re Petition of the Tribune*, 784 F.2d at 1522-23 (holding that a district court properly denied access to "bench conference transcripts based on the government's compelling interest in the protection of an ongoing collateral law enforcement investigation).

In addition, we hold that the district court did not err in failing to specify which alternatives it considered before concluding that closure was necessary to protect the government's compelling interest. We note that the *Times* failed to suggest a logical and workable alternative for the district court's consideration, and also failed to suggest a workable alternative for this court's consideration in its brief or at oral argument. *See Gannett*, 443 U.S. at 401, 99 S.Ct. at 2916 (recognizing that those who object to closure have the responsibility of showing that reasonable alternatives are available to adequately protect the interest being considered). The only apparent alternative available to the district court in this case was the release of a redacted version of the sealed transcripts. We find, however, that the release of a redacted version of the transcripts would have been inadequate to protect the government's interest in the ongoing investigation at the time of the November 6, 1992 hearing. Accordingly, we

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1992 order, the *Times* is not precluded from making a subsequent motion to unseal or a motion to amend due to changed circumstances in the ongoing law enforcement investigation.

find no error in the district court's failure to state specifically that it considered and rejected the alternative of releasing a redacted version of the transcripts, especially in light of the *Times*'s failure to offer any alternative other than unsealing the disputed transcripts.

(iii) Sealed Docket

The *Times* argues that the Middle District's maintenance of the dual-docketing system denied it any meaningful opportunity to be heard on its exclusion from closed pretrial proceedings. The government responds that this court should avoid binding the district court to any formal procedure that is unduly burdensome. Although this court in *Newman* decided not to bind the district courts to the formality of any set procedure for closure, the *Newman* court did hold that "the issue [of closure] must be squarely confronted and those with various interest must be given the opportunity to be heard." *Newman*, 696 F.2d at 802. The Middle District's maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings. *See CBS, Inc. v. District Court*, 765 F.2d 823, 826 (9th Cir.1985) (noting that "a two-tier system, open and closed" erodes public confidence in the accuracy of records, and thus denies the public and press its right to meaningful access).

In this case, the sealed docket completely hid from public view the occurrence of closed pretrial bench conferences and the filing of *in camera* pretrial motions. These events remained hidden until a *Times* reporter happened

to be present to observe a closed bench conference. The Middle District's dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences. Thus, we hold that the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings.

CONCLUSION

We find no error in the district court's exercise of its traditional authority to conduct closed bench conferences, where the court later allowed the press an opportunity to be heard on the release of the transcripts to the closed proceedings within a reasonable time. *See Press-Enterprise I*, 464 U.S. at 512, 104 S.Ct. at 825. Based on the district court's findings and our review of the sealed transcripts, we affirm the district court's November 6, 1992 order denying the *Times*'s emergency motion to unseal the transcripts of the closed bench conferences and *in camera* motions. We also hold that the Middle District's use of a public and a sealed docket to note criminal proceedings is an unconstitutional infringement on the right of the public and press to seek the release of *in camera* motions and trancripts of closed bench conferences.[4]

AFFIRMED.

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[4] Having addressed the *Times*'s claims for relief in this expedited appeal under the collateral order doctrine, we deny the *Times*'s petition for a writ of mandamus. *See United States v. Fernandez-Toledo*, 737 F.2d 912, 919 (10th Cir. 1984) (holding that a writ of mandamus is appropriate only for extraordinary situations where no other adequate means of obtaining relief is available).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

CASE NO. 92-28-CR-T-17

CHARLES B. CORCES

_____/

ORDER ON MOTION TO UNSEAL COURT RECORDS

This cause is before the Court on the "Amended Emergency Motion of Times Publishing Company to Intervene and Unseal Court Records and Request for Expedited Hearing" filed October 26, 1992 (Docket No. 114); "Motion for Leave to Intervene and Joinder in the Amended Motion of Times Publishing Company to Unseal Court Records" filed October 28, 1992 (Docket No. 124); and "Government's Response to Motion of Times Publishing Company to Intervene" filed October 26, 1992 (Docket No. 115).

Procedural Background

A Federal indictment was filed in this cause on January 29, 1992, naming as defendants John S. Valenti (a Hillsborough County, Florida Assistant State's Attorney) and Charles B. Corces (a member of the Florida Bar and practicing criminal defense attorney in Hillsborough County). The cause was assigned by random draw to the Honorable William J. Castagna. On May 4, 1992, Judge Castagna filed an order recusing himself from this action and the case was reassigned to the undersigned, under

the system of blind draw which is the custom of the Middle District of Florida.

The indictment alleged corruption and bribery counts against the two defendants. The indictment further named Manuel A. Machin (a member of the Florida Bar and practicing criminal defense attorney in Hillsborough County) as participant in the alleged criminal activity, as well as two (2) lay persons, to wit: Nelson Gonzalez and Eliud Ramos.

Subsequent to the indictment, Mr. Valenti was rearraigned on April 29, 1992, and entered a plea to a superseding information in front of Judge Castagna. Thereafter, the United States Government filed a superseding indictment against the defendant Charles B. Corces on September 10, 1992. The superseding indictment additionally charged racketeering.

On October 23, 1992 and October 26, 1992, respectively, the Times Publishing Company filed an emergency motion and amended emergency motion to intervene and unseal court records. The Court is considering only the amended motion herein. The Tribune Company was allowed to join in the motion as requested on October 28, 1992, The Court granted the joint motion to intervene, on a limited basis, on October 29, 1992 (Docket No. 132).

The motion of the intervenors requests the following actions be taken by this Court, including only the requests not already ruled on: 1) issue an order unsealing the transcripts of October 19, 1992, October 21, 1992, and October 22, 1992 secret proceedings; 2) refrain from conducting any portion of this prosecution except in open court to which the public and the press have access

unless, a. the news media has been given notice and opportunity to be heard, b. the Court makes specific findings demonstrating why closure is necessary, articulated on the record in open court, and c. the Court certifies the record to the appellate court for emergency review.

The Court held hearings on the motion to unseal on October 23 and 28, 1992. The Court announced at the hearing of October 28, 1992, that it was certifying an *in camera* submission to the Eleventh Circuit Court of Appeals seeking guidance and response to certain certified questions regarding the disclosure of the records sought. Additionally, at the time of this hearing the intervenors orally expanded their motion to request access to all sealed proceedings in this matter.

On October 29, 1992, the Court certified questions to the appellate court, supported by an *in camera* submission. The appellate court notified this Court, on November 3, 1992 at 3:42 p.m, by facsimile, that it was transferring the filing to the miscellaneous docket and that no further action would be taken by the Court. Thus, the Court must rule on the pending motion for access without the guidance it requested and which it deemed important to the issues raised.

Discussion

The Court has reviewed the sealed records in this cause of action to determine what proceedings exist in those records and which, if any, of the proceedings should be released to the intervenors. The Court has attempted to label each proceeding in a manner which

will serve as notice of the proceeding to the intervenors without revealing information which the Court determines is not appropriately public in nature. The following is a list of those proceedings as labeled by the Court (the *in camera* docket number will be included):

1. During a status conference on the case on February 14, 1992, in front of Judge Castagna, the Assistant United States Attorney asked for and received a sidebar conference, a portion of which was held ex parte. This Court is of the opinion that the intent of the Court and the government was that the entire sidebar be held *in camera*. This Court is, therefore, treating it as a sealed proceeding in its consideration of the pending motions. The intervenors seek to unseal the transcript of this sidebar proceedings. (Docket S-31). This sidebar conference pertains to continuing investigations being conducted by law enforcement.

2. On March 18, 1992, a motion was filed ex parte, *in camera*. (Docket S-3). This motion pertains to continuing investigations being conducted by law enforcement.

3. On April 22, 1992, the government filed an *in camera* and ex parte motion to continue the trial in the cause. (Docket S-7). The motion addressed ongoing investigations and the impact of release of the motion and commencement of trial would have on the same.

4. On August 13, 1992, there was an *in camera* proceeding held before Magistrate/Judge Elizabeth A. Jenkins, wherein the defendant sought to have the government's response to certain pre-trial motions stricken from the public record and sealed pursuant to 18 U.S.C. § 3153(c)(1).

The motion was granted and the pleading was removed from the public record and placed under seal. (Docket S-9)

5. The undersigned conducted *in camera* and/or ex parte proceedings in this cause based on the government's *in camera* motion of October 16, 1992, (Docket S-215), as follows:

a. October 19, 1992, sidebar conference with the government and defendant and his counsel. The purpose of that sidebar conference was to inform the defendant regarding certain constitutional rights and involved discussion of ongoing investigations by law enforcement. (Docket S-27, Exhibit 1).

b. October 19, 1992, ex parte sidebar conference with the government which discussed continuing investigative matters being conducted by law enforcement. (Docket S-27, Exhibit 1A).

c. October 19, 1992, sidebar conference the substance of the earlier ex parte sidebar was revealed to the defendant and his counsel. (Docket S-27, Exhibit 2).

d. October 21, 1992, sidebar conference with the government and defendant and his counsel wherein the defendant exercised certain constitutional rights and wherein ongoing investigations were discussed. (Docket S-34).

6. This Court conducted the following additional *in camera* proceedings in this cause in relation to an evidentiary hearing on various pending motions:

a. October 21, 1992, sidebar conference with the government and defendant and his counsel wherein the defendant filed under seal certain exhibits which had been received *in camera* from

the government. These exhibits again reveal aspects of ongoing investigations which the government seeks to protect from premature revelation. (Docket S-34).

b. October 22, 1992, ex parte testimony of Assistant United States Attorney relating to long-term investigative matters. (Docket S-35). The government thereafter recited to the defendant and his counsel the contents of the sidebar conference so that it was no longer ex parte but remains *in camera*.

c. October 22, 1992, ex parte sidebar conference with Assistant United States Attorney William Jung regarding continuing investigations. (Docket S-36).

7. On October 15, 1992, the United States Government filed a "Motion for Protective Order Concerning Discovery" with accompanying exhibits. (Docket S-21). Again, this motion contained information regarding ongoing investigations.

The Court recognizes the common law and constitutional right of the public, including the news media, to have access to judicial proceedings. However, that right to access is limited where it is necessary to achieve legitimate purposes. *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

The Court is convinced that in regard to each *in camera* proceeding listed previously, except for the Docket S-9, exposure of those proceedings will result in a substantial probability of irreparable damage to a compelling interest (i.e., protection of continuing law enforcement investigations), that the alternative to closure will not

adequately protect that interest and that there is a substantial probability that closure will be effective in protecting against the harm feared by the moving party. *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982), citing, *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979).

As to the remaining sealed procedure (Docket S-9), the Court finds that disclosure of that information is governed by 18 U.S.C. § 3153(c)(1). The motion for access will be denied based on the compelling and legitimate interest in sustaining the closure of the proceedings.

The intervenors further assert that the procedures of the Court do not provide sufficient constitutional notice of the intent to proceed under seal or *in camera.* The Court has reviewed the procedures established by the Clerk of the Court for the Middle District of Florida in regard to the handling of sealed and classified matters.

As to the procedures promulgated by the Clerk of the Court and adopted by the Middle District of Florida, the Court is satisfied that the failure of the procedures to sufficiently set forth the existence and the date of specific and particular *in camera* proceedings or documents, without revealing the substance of the proceedings or documents on a public docket, is insufficient in regard to the instant case which is of intense media concern and scrutiny.

This Court is of the opinion that in this particular case the notice issue needs to handled in a manner other than that dictated by the usual policies of the Clerk's Office of this district. The following instructions issued to the Clerk of the Court apply only to this case and are not

an attempt to alter the procedures of the court and the clerk's office without the concurrence of the judiciary of this district. Accordingly, it is

ORDERED that the emergency motion to unseal court records (Docket No. 114) be denied; the Clerk of the Court be directed to annotate any future *in camera* pleadings on the public docket as follows: 1) date of proceeding or pleading, 2) court approved label for *in camera* proceeding or pleading, and (3) docket number for *in camera* proceeding or pleading; and this record shall be certified for immediate appeal to the Eleventh Circuit Court of Appeals.

DONE AND ORDERED in Chambers in Tampa, Florida this 6th day of November, 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Court

Copies to:

All Parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES B. CORCES

CASE NO. 92-28-CR-T-17

ORDER

This cause is before the Court on "Amended Emergency Motion of Times Publishing Company to Intervene and Unseal Records and Request for Expedited Hearing", filed by Times Publishing on October 26, 1992, and "Motion for Leave to Intervene and Joinder in the Amended Motion of Times Publishing Company to Unseal Court Records", filed by The Tribune Company, on October 28, 1992. As previously explicated in open court, it is

ORDERED that the motions to intervene be granted only insofar as Times Publishing and The Tribune Company may intervene for the limited purpose of seeking to unseal the court records to which they have not previously had access.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 29th day of October, 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Court

Copies to: All Parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES B. CORCES

CASE NO. 92-28-CR-T-17

ORDER

This cause is before the Court on "Emergency Motion of Times Publishing Company to Stay Proceedings Pending Review by the United States Court of Appeals for the Eleventh Circuit", filed October 29, 1992. This Court, by order of the instant date, granted the Times Publishing Company and The Tribune Company's motions to intervene "only insofar as Times Publishing and The Tribune Company may intervene for the limited purpose of seeking to unseal the court records to which they have not previously had access." Accordingly, it is

ORDERED that the motion to stay be denied for lack of standing on the part of the moving party, Times Publishing Company.

DONE and ORDERED in Chambers, in Tampa, Florida, this 29th day of October, 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Court

Copies to: All Parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES B. CORCES

CASE NO. 92-28-CR-T-17

ORDER DENYING MOTION TO STAY

This cause is before the Court on "Emergency Motion of the Times Publishing company to Stay Proceedings Pending Review by the United States Court of Appeals for the Eleventh Circuit of Times Publishing Company's Petition for Writ of Mandamus" filed November 2, 1992. The motion seeks, for the second time, a stay of the trial scheduled to commence this date as to Defendant Charles B. Corces.

This motion bases the request for the stay on the fact that the intervenor has moved the appellate court for instructions to this Court to release certain *in camera* documents. The motion alleges that the media cannot provide complete and accurate coverage of the pending trial without access to the information. The Court has thoroughly reviewed the *in camera* documents and finds that the lack of access to those documents poses no impediment to the media coverage of the trial. Accordingly, it is

ORDERED that the motion to stay be denied.

DONE and ORDERED in Chambers, in Tampa, Florida, this 2nd day of November, 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Court

Copies to: All Parties and counsel of record